

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS
DISTRICT OF COLUMBIA
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IN THE

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Court of Appeals, District of Columbia.

APRIL TERM, 1931.

No. 5493

66

NEW AMSTERDAM CASUALTY COMPANY,
APPELLANT,

v.

ROBERT J. HOAGE, DEPUTY UNITED STATES
EMPLOYEES' COMPENSATION COMMISSIONER FOR
THE DISTRICT OF COLUMBIA.

BRIEF for APPELLANT.

MORRIS SIMON
LAWRENCE KOENIGSBERGER
EUGENE YOUNG
SELIG C. BREZ

Attorneys for Appellant.

IN THE
Court of Appeals, District of Columbia.

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v.

ROBERT J. HOAGE, DEPUTY UNITED STATES
EMPLOYEES' COMPENSATION COMMISSIONER FOR
THE DISTRICT OF COLUMBIA.

BRIEF for APPELLANT.

STATEMENT OF THE CASE.

This is an appeal (R. 18-19) from a decree of the Supreme Court of the District of Columbia (R. 18) dismissing the Bill of Complaint of New Amsterdam Casualty Company, in an appeal to that Court from

an award of compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 [U. S. C., Sup. IV, Title 33, Chapter 18], made generally applicable in the District of Columbia by Act of May 17, 1928 [D. C. Code, Title 19, §§ 11, 12]. The Act of March 4, 1927, will be referred to in this brief as the Compensation Law.

On November 25, 1930, one John Brosnan, Jr., was in the employ, as a solicitor, of The Washington Post Company, a corporation engaged in business in the District of Columbia. Pursuant to the provisions of Section 32 (a) (1) of the Compensation Law [U. S., Sup. IV, Title 33, Section 932 (a) (1)], there was on that day in force a policy of insurance issued by appellant to insure the payment of compensation to employees of The Washington Post Company (R. 2-3).

On the date mentioned, Brosnan, while walking across Eighth Street N. W., at its intersection with M Street, fell to the ground and fractured his skull as a result of which injury he died. He was at the time engaged in pursuing his employment as a solicitor for The Washington Post Company.

A hearing was had before appellee as Deputy Compensation Commissioner. The sole question for determination was whether Brosnan's injury arose out of his employment within the meaning of Section 2 (2) of the Compensation Law [U. S. C., Sup. IV, Title 33, § 902 (2)]. At the hearing appellant admitted that Brosnan had sustained an injury while engaged in the course of his employment, but denied that he had sustained an injury which arose out of his employment (R. 19).

Emerett L. Wiseman, an employee of the Gulf Gasoline Station (R. 4) which was at the southwest corner of Eighth and M Streets N. W. (R. 13), testified that on the day in question he was working at his employment and had a clear view of the street; his attention was attracted by a noise, and as he looked up Brosnan was turning, his hands were away up, and he fell; witness went out and saw blood coming from Brosnan's ear; witness went to Brosnan who asked what had happened to him; there was blood on the street three or four feet from the curb farther out on the street than Brosnan had been (R. 4), and in the line of the sidewalk of M Street; witness judged that Brosnan had been walking toward the curb but he did not know definitely; Brosnan hit the back of his head; he did not look as if he had been knocked down by anything and there were no vehicles nearby which could have struck him. Brosnan looked like a man who could not hold his feet (R. 5).

George D. Holler, also an employee at the Gulf Gasoline Station who was in the office with the witness Wiseman at the time, saw Brosnan fall backwards with his hands up, while he was near the center of the street; the witness could not say that he looked as if he slipped or stumbled; Brosnan was facing west; there was no traffic that could have hit him (R. 13).

Edwin E. Ellett, who was also at the Gulf Station when Brosnan fell, testified that he turned around and saw Brosnan lying in the middle of the street right off the southwest corner of Eighth Street, with his head toward the center of the street and his body lying north and east, his head toward the center of the street,

and his feet about a foot from the curb; there were no automobiles in the vicinity which might have struck him (R. 12-13).

William Law, an employee of Kingman's Filling Station, at the northwest corner of Eighth and M Streets, testified that he did not see Brosnan fall, but saw him after he fell at which time he was lying on Eighth Street just off the curb and close to M Street, with his head pointing toward Seventh Street and his feet toward Ninth Street, and his body about parallel with M Street and in line with the M Street sidewalk; there were no automobiles around that may have struck him; blood was pouring from one of his ears (R. 12).

Nellie Brosnan, a sister of the deceased, testified that Brosnan was in good health, that he had had dropsy the preceding spring but had been cured thereof, and that he had not touched a drop of liquor for two years (R. 3-4).

Ethel Payton, at whose home Brosnan had lived for a little over three years, testified that he drank during the first year and then stopped and was apparently as well as could be (R. 4).

H. L. Payton, husband of Ethel Payton, testified that Brosnan drank during the early part of the period during which he lived with the Paytons, but had not drunk anything for about a year or longer (R. 5).

Dr. E. M. Ellison, a physician, testified that Brosnan had been under his professional care at rather frequent intervals for fourteen years; that during the first several years he did not drink at all so far as witness knew, and witness was under the impression

that he must have been drinking approximately two or three years altogether; witness always cautioned him against drinking; Brosnan had been a little overweight; witness never heard of him having anything like a fit, but he had a nervous and irritable heart; witness saw Brosnan on the afternoon following the accident, at which time he was having a rather severe convulsion, apparently due to the fractured skull; Brosnan died of the fracture of the skull with probably terminal pneumonia, which was probably a complication of the accident; witness had cautioned Brosnan against the use of intoxicating liquor because drinking to excess is harmful and undermines the average system, the nervous, circulatory, digestive, gastric, etc. Witness would not say that it probably affects the heart, but it is supposed to affect the liver and cause cirrhosis of the liver, which could be fatal; Brosnan did not have an enlargement of the heart so far as witness knew; the blood pressure is likely to be high as the result of the excessive use of intoxicants; witness had found that Brosnan had an irritable heart and that his blood pressure was slightly above normal but never excessively high; abnormal blood pressure is apt to result in sudden collapse and quick death; many men died from a sudden collapse; Brosnan might have died in bed from a cerebral hemorrhage caused by high blood pressure; the use of alcohol in excess is generally prohibited by physicians to patients suffering from high blood pressure (R. 5-7).

Dr. N. Norman Smiler, a physician, testified that he treated Brosnan at Emergency Hospital on November 25, and found him unconscious and suffering from a

fracture of the right side of his skull; witness examined his whole body but found no other fractures or abrasions, although he looked for them (R. 7).

Dr. John J. Shugrue, a physician, testified that when he first saw Brosnan on November 25, he found a fracture of the skull, and various symptoms which were results of the fracture. An operation was performed and the patient died at 10.15 a. m. on November 27; witness testified that anything in medicine might cause a person standing or walking on the street suddenly to collapse and fall, and that a number of things outside of a trauma might cause a fall (R. 7-9).

Dr. A. Magruder Macdonald, a physician, who had performed an autopsy on the body of the deceased, testified as to his findings, which included a hypostatic congestion of the lungs, an enlarged hypertrophic heart, and cirrhotic kidneys and liver (R. 10). He testified that the cause of death was a fractured skull with resulting hemorrhage and shock; that sometimes a hypertrophic condition of the heart would cause sudden death; in this case the witness thought that with the condition of the kidneys and cirrhotic liver, a triangle of trouble was produced between the three organs (R. 11). The witness was of the opinion that the hypertrophic condition of the heart was the direct result of that condition, in other words, the heart had a bigger job to do and enlarged itself to meet the situation. Witness did not say absolutely that could have caused death; if the heart was doing this normally it could; that is the sort of heart that is apt to give out; that sort of heart, where it does not cause death di-

rectly might cause sudden collapse which may or may not result in death. The cirrhotic condition of the kidneys and liver reduced the effective area of these organs, which imposed an extra burden on the heart; the witness had heard the testimony of the other witnesses and was familiar with the history of the case, but stated that he did not know what was the cause of Brosnan's collapse on the street; he supposed with the amount of disease exhibited pathologically in this case, anything that you would put your finger on would be the cause; he may have had an acute trouble with his heart, something wrong with the innervation, or a thrombosis, which is a clot in the circulation system (R. 12); there is such a thing as falling in the case of vertigo or in a faint (R. 13).

Under date of April 30, 1931, appellee, as Deputy Compensation Commissioner, made his findings and award by which he found that Brosnan sustained a personal injury which arose out of and occurred in the course of his employment, and resulted in his disability and death (R. 15-17), and ordered appellant, as insurance carrier for the employer, to pay \$200 for the funeral expenses of the deceased and to pay \$1,000 to the Treasurer of the United States for the special rehabilitation fund authorized by Section 44 of the Compensation Act [U. S. C., Sup. IV, Title 33, Section 944], by reason of the fact that there were no dependent beneficiaries entitled to compensation (R. 16-17).

Appellant, as insurance carrier for the employer of the deceased, thereupon filed its bill to set aside the award, which bill was subsequently amended (R. 2-15).

Defendant (appellee) moved to dismiss the bill (R. 17-18), which motion was granted (R. 18). It is from the decree dismissing the bill that this appeal is prosecuted (R. 18-19).

ASSIGNMENT OF ERRORS (R. 20).

The Court erred in dismissing the Bill of Complaint as amended.

ARGUMENT AND AUTHORITIES.

NO EVIDENCE TO SUSTAIN AWARD.

The appeal to the Supreme Court of the District of Columbia was prosecuted pursuant to the provisions of Section 21 (*b*) of the Compensation Law [U. S. C., Sup. IV, Title 33, Section 921 (*b*)], which provides—

“If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *”

It is respectfully submitted on behalf of appellant that while the injury which caused the death of decedent arose *in the course of* his employment, it did not arise *out of* his employment, and consequently no compensation is payable, by reason of the requirement of Section 2 (2) of the Compensation Law [U. S. C.,

Sup. IV, Title 33, Section 902 (2)] that the injury, to be compensable, must arise out of *and* in the course of employment. The testimony before the Deputy Compensation Commissioner showed that the deceased, while walking along the street, suddenly threw up his hands and fell to the pavement, as a result of which he sustained a fracture of the skull from which he died. The evidence showed conclusively that his fall was not due to any of the hazards of his employment such as a traffic accident (R. 4, 5, 12, 13), nor was it even due to the hazard of walking along the street, but was such an injury as would have happened no matter where deceased might have been. The medical testimony and the testimony based upon the autopsy showed certain derangements of his internal organs which might have caused his collapse and fall (R. 5-21).

Under these circumstances the award is not aided by the presumption provided for in Section 20 (a) of the Compensation Law [U. S. C., Sup. IV, Title 33, Section 920], which is as follows:

“In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

“(a) That the claim comes within the provisions of this Act.”

This provision will not avail to support an award in the entire absence of evidence to support it, and in the face of positive evidence showing that no award of compensation is justified.

Section 20 (a) of the Compensation Law [U. S. C., Sup. IV, Title 33, § 920 (a)] is similar in its provisions to Section 21 of the Workmen's Compensation Law of New York.

In *Collins vs. Brooklyn Union Gas. Co.*, 171 App. Div. (N. Y.) 381, the Court said:

“There is nothing in section 21, or any other part of the act, which relieves a claimant from producing evidence that the injuries arose ‘out of and in the course of’ an employment of the injured person by the employer against whom the claim is directed. Once that evidence of the employment, the injury in the course of it, the injury as result of something arising from the employment is submitted, the first presumption enumerated in section 21 carries presumption of the Commission’s jurisdiction, the applicability of the statute, the ‘hazardous’ character of the employment proved, and the inclusion of the work being done by the injured person at the time of the injury within the scope of an ‘employment’ enumerated and defined as ‘hazardous’ (*Matter of McQueeney vs. Sutphen & Meyer*, 167 App. Div. 528. *Matter of Kohler vs. Frohman*, *id.* 534) and the second, third and fourth items of section 21 carry presumptions covering, in the absence of substantial evidence to the contrary, the other conditions precedent specified in section 10. The Commission is not authorized, however, to make an award under the Act in the absence of at least some evidence that the employee met with an injury while he was at work for a specified employer, and as a consequence of something that had a relation to the work of the employer, something done by him or by others while he was so employed.”

This decision was approved by the New York Court of Appeals in the case of *Eldridge vs. Endicott*, 228 N. Y. 21, in which the Court said:

“Section 21 of the Workmen’s Compensation Law is not a substitute for facts. * * *”

In *Gale vs. Munro*, 184 N. Y. Suppl. 413, decided in 1920, the Court laid down the rule that the burden of proof is on the claimant to show that the accident arose out of the employment, and in *White vs. American Society for the Prevention of Cruelty to Animals*, 180 N. Y. Suppl. 867, the Court said (p. 869):

“It is now well established that a claimant must prove an accident arising out of and in the course of the employment and that he cannot rely on the presumption of section 21 of the Workmen’s Compensation Law as a substitute for such proof. *Collins vs. Brooklyn Union Gas Co.*, 171 App. Div. 381. *Eldridge vs. Endicott*, 228 N. Y. 21.”

It will be noted that Section 20 [U. S. C., Sup. IV, Title 33, § 920] provides that the presumption shall exist “in the absence of substantial evidence to the contrary.”

In the instant case there was substantial evidence to the contrary, *i. e.*, the fact that the testimony showed positively that whatever caused Brosnan to fall must have been due to some weakness inherent in his own person.

The rule as to the effect on presumptions of counter-vailing evidence is well illustrated by the decision of this Court in the case of *Curry vs. Stevenson*, 58 App.

D. C. 162. That was an action against the owner of an automobile for damages growing out of an injury caused thereby.

The plaintiff having proved the ownership of the automobile, relied upon the presumption that at the time of the accident the same was in the possession of the owner or of a driver thereof acting on his behalf. This Court, while approving this rule, held that this presumption continues only so long as there is no substantial evidence to the contrary; that when that is offered the presumption disappears, and unless met by further proof, there is nothing to justify a finding based solely thereon; and that in the absence of such further proof on behalf of the plaintiff a verdict for the defendant is properly directed.

The rule herein contended for has had the approval of this Court in the case of *New Amsterdam Casualty Company v. Hoage* (59 W. L. R. 91) in which it was said:

“Upon proof of an injury and that the relationship of employer and employee existed at the time, the presumption arises (in the absence of substantial evidence to the contrary) that the claim for compensation ‘comes within the provisions of this Act.’ If substantial evidence to the contrary is introduced and no other evidence is introduced on behalf of the claimant, the presumption must give way. ‘Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place, when in conflict with clear, distinct and convincing proof.’ *Frech v. Gilson*, 16 Pet. 327, 331. See also *Flannery v. Willcuts*, 25 F. (2d)

951, 953; *Loetscher v. Burnet*, No. 5011, decided this day, 59 Wash. Law Rep. 90; *Curry v. Stevenson*, 58 App. D. C. 162, 26 F. (2d) 534, 56 Wash. Law Rep. 376.”

We respectfully submit that in this case, the evidence clearly showed that Brosnan’s fall was due to some cause within himself and was not to any extent traceable to his employment; that for that reason the presumption provided for by Section 20(a) of the Compensation Law passes out of consideration, that positive facts are required for the sustaining of the award, and that the evidence wholly failed to measure up to that requirement.

We further submit that even though it might be held that there was substantial evidence before appellee as Deputy Compensation Commissioner, nevertheless the Court below was not thereby precluded from re-examining the case *de novo*.

Crowell v. Benson, 45 Fed. (2d), 66, 69.

CONCLUSION.

In conclusion it is respectfully submitted that the decree of the Court below dismissing the bill of complaint should be reversed.

Respectfully submitted,

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FOR MR. JUSTICE ROBB

COURT OF APPEALS
DISTRICT OF COLUMBIA
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NEW AMSTERDAM CASUALTY COMPANY, APPELLANT
v.

**ROBERT J. HOAGE, DEPUTY COMMISSIONER FOR THE
DISTRICT OF COLUMBIA OF THE UNITED STATES
EMPLOYEES' COMPENSATION COMMISSION, AP-
PELLEE**

BRIEF FOR APPELLEE

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In the Court of Appeals of the District of Columbia

No. 5493

NEW AMSTERDAM CASUALTY COMPANY, APPELLANT,

v.

**ROBERT J. HOAGE, DEPUTY COMMISSIONER FOR THE
District of Columbia of the United States Em-
ployees' Compensation Commission, appellee**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

John Brosnan, Jr., an employee of the Washington Post Company, a corporation engaged in business in the District of Columbia, sustained injuries on November 25, 1930, which terminated in his death on November 27, 1930. While engaged in his work as a solicitor for the above-named employer, Mr. Brosnan was seen to fall as he approached the curb line along 8th St. NW., at the southwest corner of this street at its intersection with M Street NW. The evidence does not disclose what took place immediately preceding the fall, but observations of witnesses made during the act of falling indicate that Mr. Brosnan fell backwards into the street,

with his hands thrown above his head. He apparently struck the pavement with sufficient force to fracture his skull, since it was found that he had a severe fracture of the skull with intercranial hemorrhage which resulted in his death. Autopsy findings and other medical evidence in the case fail to disclose that the fall resulting in Mr. Brosnan's death was due to an inherent bodily disease or other idiopathic condition. The appellant herein in the compensation proceedings admitted that on the day Mr. Brosnan sustained his injuries he was acting in the course of his employment for the employer above named.

A hearing was held on March 5, 1931, by Robert J. Hoage, deputy commissioner, United States Employees' Compensation Commission for the District of Columbia, appellee herein, under the provisions of the compensation law in effect in the District of Columbia, namely, the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (U. S. C., Title 33, Chapt. 18), made applicable to the District of Columbia by the Act of May 17, 1928 (D. C. Code, Title 19, Chapt. 2, Secs. 11, 12), which will be referred to hereinafter as the compensation law. Upon the evidence adduced at this hearing a compensation order was filed by the appellee on April 14, 1931, in which it was found that Mr. Brosnan died as a result of injuries sustained by reason of a fall as above described and that his death arose out of and occurred in the

course of his employment; that the deceased was survived by no dependent beneficiaries entitled to compensation; that the employer and insurance carrier are liable for the payment of \$1,000 to the special fund provided in section 44 of the said Act; and that burial expenses in the amount of \$200 shall be paid to the undertaker rendering the service. (R. 15.)

The appellant herein on April 30, 1931, filed a bill of complaint as amended in the Supreme Court of the District of Columbia praying for injunctions pendente lite and permanent against the enforcement of the compensation order referred to. (R. 2.) To the bill of complaint as amended, motion to dismiss was filed May 13, 1931 (R. 17), and a decree was entered July 3, 1931, by the Supreme Court of the District of Columbia dismissing the said bill of complaint (R. 18). From this decree the present appeal is taken.

QUESTION FOR DECISION

The sole question for decision in this case is whether Mr. Brosnan's injuries and death arose out of his employment within the meaning of section 2 (2) of the compensation law. The section under consideration reads as follows:

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or una-

voidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

The appellant at page 8 of its brief admits that the injuries sustained by Mr. Brosnan occurred in the course of his employment within the meaning of the statute.

This appeal is brought under section 21 (b) of the Longshoreman's Act which provides judicial review of a compensation order to determine whether it is "not in accordance with law."

THE LOWER COURT DID NOT ERR IN DISMISSING THE BILL OF COMPLAINT FILED BY THE APPELLANT HEREIN IN ITS APPEAL TO THAT COURT FOR A REVIEW OF THE COMPENSATION ORDER MADE BY THE APPELLEE HEREIN BASED ON THE EVIDENCE IN THE CASE

Review of the testimony

The appellee contends that the findings of fact made by him in the administration of the compensation law applicable to the District of Columbia are conclusive upon the court where supported by any competent evidence. In the argument on the law hereinafter appearing appellee sets forth the law with respect to the conclusiveness of findings of fact. The compensation law in providing for a review of a compensation order does not contemplate that the court will review the evidence taken before the deputy commissioner for the purpose of determining the relative weight of the evidence upon which his conclusions are based. The view

taken is that the court will inquire merely whether or not there is any competent evidence to support the said findings.

With this in mind the appellee sets forth below in narrative form the evidence which in his belief, under the law, is ample to support the said compensation order. Since it is presumed that the court will not be interested in the relative weight of the evidence to determine which of two inferences should be drawn therefrom, if it can be said that two inferences appear, the appellee will recite only that portion of the evidence which he believes to be sufficient to sustain the findings and conclusions of the deputy commissioner.

Nellie Brosnan, sister of the deceased, testifies that on the evening of the day following the injury she found a blood spot five or five and one-half feet from the curb line at the corner of 8th and M Streets; that her brother was in good health, apparently ordinary health, and that he worked every day; that Mr. Brosnan had not touched any spirituous liquors for two years. (R. 3.)

Ethel Payton testified that Mr. Brosnan lived at her house for a little over three years; that he drank during the first year but at the time of his death he had not drunk for approximately two years; that he went to work every day before the accident; that the deceased was 45 or 46 years old and weighed about 160 pounds.

Emerett L. Wiseman testified that on the day of the accident he was working on his books at the

Gulf Gasoline Station, 8th & M Streets; that his attention was attracted by a noise on the other side of the station and upon looking up he noticed Mr. Brosnan was turning, his hands were away up, and witness saw him fall; that was the first view witness had of him and he could not tell whether Mr. Brosnan was at the curb or approaching the curb; that witness observed Mr. Brosnan was falling backwards and turning; that witness later observed that blood was coming from Mr. Brosnan's ear; that Mr. Brosnan had not been drinking (R. 4); that witness could not tell which direction Mr. Brosnan had been walking but judged that he was approaching the curb; that deceased had fallen away from the curb striking his head, although he did not fall as if he had been knocked down by anything; that Mr. Brosnan looked like a man who could not hold to his feet and that he threw his hands up (R. 5).

H. L. Payton at whose home deceased lived testified that Mr. Brosnan had not drunk for the last year or longer; that he was a man of regular habits and went to work regularly every morning, and that he looked mighty well. (R. 5.)

Dr. E. M. Ellison, physician, testified that he knew Mr. Brosnan for about 17 years, during which time he treated him for 14 years (R. 5); that he never heard of deceased having anything like a fit; that deceased had a nervous or irritable heart, i. e., a very rapid heart under excitement,

which is not a dangerous condition and would not cause death, and as far as he knew the heart was not enlarged (R. 7.); that he had not seen Mr. Brosnan professionally since March 4, 1930, but that he had met him on the street occasionally; that he saw Mr. Brosnan after the accident and he knew that deceased died as a result of fracture of the skull accompanied by terminal pneumonia brought on by the accident; that Mr. Brosnan had chronic asthma, which rarely causes death (R. 6); that the witness took Mr. Brosnan's blood pressure on many occasions and found it generally slightly above normal but never excessively high (R. 7).

Dr. N. Norman Smiler, physician, testified that he treated Mr. Brosnan at Emergency Hospital on November 25, 1930, for fracture of the skull; that Mr. Brosnan was unconscious and had a hemorrhage from the right ear due to the fracture; that the X ray showed fracture on right side of head; that there were no other fractures or abrasions upon the deceased's body; that Mr. Brosnan died November 27, 1930, after an operation. (R. 7.)

Dr. John J. Shugrue, physician, testified that he was called in on consultation on November 25, 1930 (R. 7), when he found Mr. Brosnan disoriented, irrational, and bleeding from the right ear; that the X-Ray confirmed his finding of fractured skull and he performed an operation to correct the injury, but Mr. Brosnan died November 27, 1930, as a result of the injury to his head (R. 8). This

witness would not testify as to what caused Mr. Brosnan to fall. (R. 8, 9.)

Dr. A. Magruder MacDonald, physician, testified that he performed the autopsy on Mr. Brosnan's body (R. 9); that he found a fractured skull and hemorrhages in the brain together with the repairs made by the operation; that further he found a hypertrophic heart, kidneys, and liver cirrhotic, and the stomach walls greatly thickened; that the cause of death was fracture of skull with resulting hemorrhage and shock; that there was no evidence of a cerebral hemorrhage except that resulting from the fall and nothing in the nature of apoplexy (R. 10); that witness would not say that hypertrophic or enlarged heart could have caused death; that witness after hearing testimony at the hearing and being familiar with the history of the case when asked his opinion of the cause of Mr. Brosnan's fall stated that he did not know; that witness was not interested in the cause of the fall, but in what caused Mr. Brosnan to die, and the condition of the brain and skull was sufficient to answer that question; that witness stated further that a man could have slipped and tripped off the curb and fallen (R. 11); that witness could not tell whether it was an internal or external cause which was responsible for the fall, he could either have had something internally wrong or he may have missed his step and was throwing his hands up to catch himself when he fell (R. 12).

William Law employed at Kingman's Filling Station, 8th & M Streets NW., testified that he did not see Mr. Brosnan fall but observed him lying in the street; that there was no evidence that Mr. Brosnan had been drinking, and that blood was running from one of his ears. (R. 12.)

Edwin E. Ellett testified that on November 25, 1930, at about 11 o'clock, he was at the Gulf Station, 8th & M Streets. He states that he saw Mr. Brosnan lying in the middle of the street off the southwest corner with his feet about a foot from the curb; that witness did not see any automobiles in the vicinity that might have struck him. (R. 13.)

George D. Holler, employed at the Gulf Refining Company, gasoline station, southwest corner 8th & M Streets, testified that he was in the office with witness Wiseman; that upon looking up he saw Mr. Brosnan who was facing and apparently going west, fall backwards; that he just saw him with his hands up and falling; that he did not see Mr. Brosnan before the accident and witness was unable to tell the cause of the fall. (R. 13.)

ARGUMENT ON THE FACTS

As indicated in the first paragraph of the review of the testimony, if there is any competent evidence to support the findings of fact of the deputy commissioner his findings are conclusive upon the court. The preceding summary of the evidence contained in the record leads to only one inference and that

is that the injury and subsequent death of Mr. Brosnan arose out of and in the course of his employment. There is no evidence in the record of any intervening idiopathic or internal disease which can be said to have caused the fall. Assuming, but not in the least admitting, an idiopathic condition to have been responsible for Mr. Brosnan's fall, it will be pointed out later in the argument on the law that it matters not what the original cause of the fall may have been, if death follows as a consequence of a fall while an employee is performing duties in the course of his employment, the resultant injuries or death arise out of the employment, since the cases hold that compensation is payable for the *results* of the fall occurring in the course of the employment.

Summarized briefly, the evidence shows that Mr. Brosnan, on the day of his injury, was proceeding about his master's business and while crossing the intersection of 8th & M Streets NW. in a westerly direction was seen to fall. When the witnesses arrived at the scene of the accident he was found to be lying near the middle of 8th Street, with his feet about a foot from the west curb line, and blood was running from his right ear.

The appellant in its brief argues that the evidence shows that whatever caused Mr. Brosnan to fall must have been due to some inherent weakness within his own body. This is shown by the following statements taken from the appellant's brief:

In the instant case there was substantial evidence to the contrary, i. e., the fact that the testimony showed positively that whatever caused Brosnan to fall must have been due to some weakness inherent in his own person. (P. 11.)

The evidence showed conclusively that his fall was not due to any of the hazards of his employment such as a traffic accident (R. 4, 5, 12, 13), nor was it even due to the hazard of walking along the street, but was such an injury as would have happened no matter where deceased might have been. The medical testimony and the testimony based upon the autopsy showed certain derangements of his internal organs which might have caused his collapse and fall (R. 5-21), (p. 9).

It will be seen that the appellant's whole contention, upon which he relies in support of his argument that the lower court erred in dismissing the bill of complaint, is based upon the erroneous assumption that the record in this case shows that Mr. Brosnan sustained a fall by reason of some idiopathic or inherent bodily disease or disability.

It is respectfully asserted that at no place in the record is there any testimony which would support appellant's argument. There is no testimony in the record either directly or by inference that the fall and subsequent death of Mr. Brosnan was caused by an inherent bodily condition. The appellant's argument is based wholly upon a supposition contrary to the established facts and it will be

utterly impossible for the appellant to point out from the record any evidence in support of his argument.

The question of the employee's possible intoxication is entirely ruled out of this case since there is no evidence that he had been drinking, and it is shown by the record that Mr. Brosnan had abstained from the use of intoxicating liquors for more than a year previous to the injury. Moreover, the following presumption appears in the law to offset any suggestion of intoxication, in the absence of substantial evidence to the contrary:

SEC. 20 (c). That the injury was not occasioned solely by the intoxication of the injured employee.

The appellant at the hearing before the deputy commissioner attempted to show that the deceased had certain bodily infirmities and that they might have brought about a condition responsible for the fall. However, it appears from the record that Mr. Brosnan's blood pressure was slightly above normal but never excessively high (R. 7), and that the autopsy failed to disclose any manifestation of anything like apoplexy (R. 10). Reviewing each physician's testimony we find that Dr. Ellison and Dr. Smiler gave no opinion whatever with reference to the cause of the fall. Dr. Shugrue was unable to testify what caused Mr. Brosnan to fall (R. 9), and Dr. MacDonald when asked what in his opinion caused Mr. Brosnan to fall stated that he

had no knowledge thereof (R. 11). This physician said that it is quite possible for a man to be sick and have all the diseases in the catalogue and yet slip and fall and die from the results of a fall. (R. 12.)

At the autopsy certain physical anomalies were found but none of these anomalies were shown to be the direct or moving cause of Mr. Brosnan's fall.

The evidence establishes to the point of certainty that Mr. Brosnan died as a result of a fractured skull following immediately after his fall. All of the testimony upon which the appellant relies to establish a case of a fall resulting from inherent causes is within the realm of speculation and it is certainly inadequate as establishing "substantial evidence to the contrary" within the provisions of section 20 of the compensation law providing for a presumption in favor of the validity of a claim.

Taking the evidence as a whole, the only fair and reasonable inference which can be drawn therefrom is that Mr. Brosnan fell by reason of loss of balance due to stumbling, slipping, faulty foothold or some other cause while approaching the west curb of the sidewalk at the intersection of 8th and M Streets NW. Had he fallen because of a fainting spell, inherent disease, or any condition within himself, he would have lost consciousness and slumped inertly to the ground. The evidence shows, however, that he fell backwards and that his hands were thrown high in the air which would indicate that

he was conscious and instinctively attempting to regain his balance. His falling position and the fact that his hands were thrown above his head raise a very strong presumption in favor of a natural fall from external causes as against any presumption of loss of consciousness due to internal causes.

ARGUMENT ON THE LAW

There are three propositions of law presented in this case, namely:

1. That the findings of fact made by a deputy commissioner under the provisions of the Longshoremen's Act as made applicable to the District of Columbia are final and conclusive upon the court where the findings are supported by any competent evidence.

2. That injuries sustained by an employee while in the course of his employment due to the hazards of the public highways, i. e., traffic accidents, falling or slipping cases, and cases of similar nature are compensable as arising out of the employment.

3. That where an employee sustains injuries or dies as a result of a fall occurring in the course of his employment the injury or death likewise *arises out of* the employment, even though it may be shown that the cause of the fall is unknown, or follows as a result of an idiopathic or inherent bodily condition.

The propositions of law will be discussed in the order given.

1. That the findings of fact made by a deputy commissioner under the provisions of the Longshoremen's Act as made applicable to the District of Columbia are final and conclusive upon the court where the findings are supported by any competent evidence.

It is a well-established and fundamental rule of law in compensation cases that the facts found by the compensation administrator or board are not reviewable upon appeal or review by the courts where there is any competent evidence to support the findings so made, and the courts have consistently refused to disturb the findings of fact unless it is clearly shown that they are not supported by any evidence, and for that reason are not in accordance with law. The compensation act in force in the District of Columbia authorizes no review of the facts DE NOVO, nor does the act authorize the court to weigh the evidence where more than one inference may be drawn therefrom, to arrive at a different conclusion from that found by the compensation administrator.

The law is well settled in this respect in this jurisdiction in the case of *New Amsterdam Casualty Company v. Hoage*, deputy commissioner (Ct. App. D. C. 1931), 46 Fed. (2d) 837; 59 W. L. R. 91, and the case of *Hoage, deputy commissioner, v. Murch Brothers Construction Company* (Ct. App. D. C. 1931), 50 Fed. (2d) 983; 59 W. L. R. 552. To the same effect are the following cases: *Obrecht-Lynch Corp. v. Clark*, deputy commissioner (D. C. Md.

1929), 30 Fed. (2d) 144; *W. J. McCahan Sugar Ref. & Molasses Co. v. Norton, deputy commissioner* (C. C. A. 3, 1930), 43 Fed. (2d) 505; certiorari denied 51 S. C. R. 212; *Northwestern Stevedoring Co. v. Marshall, deputy commissioner* (C. C. A. 9, 1930), 41 Fed. (2d) 28; *Gunther v. U. S. Employees' Compensation Commission and Pillsbury, deputy commissioner* (C. C. A. 9, 1930), 41 Fed. (2d) 151; *Wheeling Corrugated Co. v. McManigal, deputy commissioner* (C. C. A. 4, 1930), 41 Fed. (2d) 593.

2. That injuries sustained by an employee while in the course of his employment due to the hazards of the public highways, i. e., traffic accidents, falling or slipping cases, and cases of similar nature are compensable as arising out of the employment.

The rule is almost universally adopted in this country, and it is adopted in England, that injury to an employee going about his master's business occurring in the course of his employment while he is upon the public highway arises out of and in the course of his employment. In the early administration of compensation laws some States adopted what was then known as the "commonalty doctrine" under which it was held that injuries on the public highways due to traffic hazards did not arise out of the employment. This doctrine led to so many injustices particularly where employees performed no services except upon the public highways

that it was repudiated in practically every State and in England. This doctrine has been abandoned in recent years.

In the administration of the compensation law applicable to the District of Columbia, the decisions of the State of New York from whence many provisions of our present act were adopted, are of especial force and value. Therefore, in applying the law to the present case, appellee has sought particularly to ascertain the construction placed thereon in the State of New York both with reference to the proposition of law set forth in this paragraph and in the next succeeding one.

The old "commonalty doctrine" does not obtain in New York as can readily be observed by considering the many cases decided in New York in the past twelve years. It can be stated, therefore, that injuries occasioned by reason of traffic hazards, falling or slipping upon the public highways, or other similar causes, incident to the use of the highways while an employee is in the course of his employment likewise arise out of the employment. The rule in England is stated in the case of *Dennis v. White & Co.*, 1917 A. C. 479, 10 B. W. C. C. 280. This case is considered a leading case both in England and the United States and the following quotation from the case briefly states the law:

If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident

by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasions on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment.

In the English case of *Arkell v. Gudgeon*, 118 L. T. 258, 10 B. W. C. C. 660 (1917), the rule expressed in the *Dennis case*, *supra*, was applied where an employee in the course of her employment slipped on something of a greasy nature on the pavement, and fell and broke her wrist.

Workmen's compensation act protects an employee passing along the streets when on his master's business if the work involves perils of street, strange, unanticipated, and infrequent though they may be, and injuries therefrom arise out of the employment. *Katz v. Kadans Co.* (N. Y. C. A. 1922), 232 N. Y. 420, citing *Dennis v. White and Co.*, *supra*. See also *Roberts v. J. F. Newcomb & Co.* (N. Y. C. A. 1923), 234 N. Y. 553.

In the case of *Schroeder & Daly Co. v. Ind. Com. of Wisc.*, 173 N. W. 328 (Wisc. 1919), a salesman who was required to go from place to place in the city slipped and injured his leg on the street. The exact cause of the fall is not shown, but in holding that the injury arose out of and in the course of the employment the Supreme Court of Wisconsin says:

If it should be held that messengers, delivery men, salesmen, and others, who by the nature of their employment are required to be continually on the streets and highways, are not entitled to compensation for injuries received in the course of their employment, if the injury occur on a street or highway, a large class of worthy applicants would be cut off and the Workmen's Compensation Law emasculated. If an employee in the course of his employment is required to go up and down a stairway occasionally or frequently, and while so doing falls and injures himself, should he be denied compensation because every one uses stairways and is continually liable to receive like injuries? Clearly not. The risk of injury to the applicant in this case was incidental to his use of the street in the course of his employment, and was peculiar to the employment, in that the work of the employee could not be carried on without his subjecting himself to that risk. It therefore grew out of his employment. The fact that others may be exposed to like risks does not change the character of the risk to which the applicant was exposed. *Globe Indemnity Co. v. Industrial Commission* (Cal. App.), 171 Pac. 1088; *In re Harraden* (Ind. App.), 118 N. E. 142; *Industrial Commission v. Aetna Life Ins. Co.* (Colo.), 174 Pac. 589; *Foley v. Home Rubber Co.*, 89 N. J. Law, 474, 99 Atl. 624; *Kunze v. Detroit Shade Tree Co.*, 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252; *Dennis v. A. J. White & Co.*, 86 L. J. K. B. 1074.

In the case of *McCulloch v. Pittsburgh Plate Glass Co.*, 140 Atl. 114 (Conn. 1927), a traveling salesman, on passing along a public highway in the course of his employment, slipped on some ice and fell, striking the lower part of his back, which resulted subsequently in his death. The Supreme Court of Errors of Connecticut, in holding that the death arose out of and in the course of the employment, states as follows:

The decedent was undoubtedly in the course of his employment when he fell upon the highway. The defendant contends, however, that the injuries he suffered did not arise out of his employment, error being assigned on the ground that the award as made placed upon the respondents a responsibility for a highway accident, due to a hazard common to the community. It has been consistently held in this state that where the employer, by the terms or implications of the contract of employment, has the right to and does require the employee to use the highways more than is common to ordinary persons, the risk and hazards to such employee are, consequently, greater than those that are incident to occasional and casual use, and that injuries sustained during and because of such greater use arise out of as well as in the course of the employment. *Harivel v. Hall-Thompson Co.*, 98 Conn. 753, 756, 120 A. 603; *Lake v. Bridgeport*, 102 Conn. 337, 342, 128 A. 782; *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 310, 97 A. 320, L. R. A.

1916E, 584; *Tiralongo v. Stanley Works*, 104 Conn. 331, 33, 133 A. 98; *Whitney v. Hazard Lead Works*, 105 Conn. 512, 517, 136 A. 105; *Moran's case*, 234 Mass. 566, 125 N. E. 591. The situation of the claimant's decedent, as disclosed by the finding, brings him clearly within this rule.

In the case of *Redner v. H. C. Faber & Sons, Co.*, 223 N. Y. 379 (N. Y. 1918), the New York Court of Appeals held that where an employee sustained an injury in the course of his employment due to a fall upon the public highway caused by slipping upon ice or snow the subsequent injury or death resulting therefrom arise out of and in the course of the employment, citing *Dennis v. White & Co., supra*.

The rule that injuries to employees in the course of their employment occasioned by reason of street accidents likewise arise out of the employment is clearly shown in the following cases picked at random from various jurisdictions.

Injury to an employee from the street risk as a matter of law arises out of employment. This is settled law in Minnesota. Employee was struck by auto truck while on foot. *Hansen v. N. W. Fuel Co.* 174 N. W. 726 (Minn. 1919).

Traveling salesman walking from home to factory after lunch was injured by an automobile while boarding street car, held injuries arose out of employment. *Porter Co. v. Ind. Com.* 133 N. E. 652 (Ill. 1922).

Where employment requires employee to go upon public street, ordinary hazards of street are incurred in course of employment and injury arises out of employment. *Morse v. Port Huron & D. R. Co.*, 232 N. W. 369 (Mich. 1930).

A solicitor for life insurance company fatally injured by street car when running across the street held injured under compensable circumstances. *Moran's case*, 125 N. E. 591 (Mass. 1920).

Where injury occurred to salesman struck by auto on public highway the injury arose out of employment. *Weston-Dodson Co. v. Carl*, 144 A. 708 (Md. 1929).

Mr. Brosnan in the present case was exposed to the ordinary perils of the highway and his injury and subsequent death followed as a result of this exposure, consequently his death arose out of and in the course of his employment.

3. That where an employee sustains injuries or dies as a result of a fall occurring in the course of his employment the injury or death likewise *arises out of* the employment, even though it may be shown that the cause of the fall is unknown, or follows as a result of an idiopathic or inherent bodily condition.

The record contains clear and convincing proof that Mr. Brosnan died by reason of a fractured skull, *the direct result of the fall* which he sustained in the course of his employment. The decisions discussed below are authorities upon the proposi-

tion that where a fall occurs in the course of the employment and the immediate consequences of the fall cause disability or death, the disability or death arises out of the employment. As above stated, particular emphasis is given to the cases obtained from the State of New York.

The court's attention is particularly invited to the case of *Mausert v. Albany Builders' Supply Co.*, 250 N. Y. 21, 164 N. E. 729, decided by the Court of Appeals of New York, December 31, 1928. In that case Mausert was employed as a teamster by the defendant company and while driving his horses at a walk over smooth pavement, he fell from his wagon seat and died as a result of injury sustained by reason of the wheels of the wagon passing over his body. There was no evidence in that case that his fall was intentional and the insurance carrier expressly disclaimed an attempt to prove intoxication. Further, there was nothing which indicated that Mausert may not have been sleepy, awkward, or stupidly negligent. The New York statute (and the compensation law in the District of Columbia) does not bar recovery on account of such conduct. The New York Act (and the Act in the District of Columbia) excludes compensation for injuries due solely to willful intention or intoxication. The Industrial Board in the *Mausert case* made no finding in respect to the cause of the fall, and the Court of Appeals was of the opinion that the cause of the fall was entirely unexplained. This is somewhat

the same situation in the *Brosnan case*. All that was known in the *Mausert case* was that death resulted from a fall which occurred while the employee was in the course of his employment. In the *Mausert case* there was no proof of illness preceding the accident but the defendant (as in *Brosnan's case*), suggested in its brief that the explanation for the fall was illness. The court in sustaining the award as arising out of and in the course of the employment gives the following clear statement of the law applicable to cases of this kind:

It is the fall and the injury resulting from it that constitutes an accident within the purview of the statute. The cause may be disregarded and the inquiry limited to an investigation to disclose whether the fall, having occurred, bore with it such consequences as would not have occurred except for the employment. A teamster, suffering from heart disease, may sink upon a quantity of straw in the stable. He may be temporarily dazed and immediately recover, or he may die from cardiac syncope. Unless his disease was caused by his employment, his death does not arise out of his employment. Another teamster, suffering from the same disease in a form not sufficiently severe to cause him to do more than to slide from his seat to the pavement, breaks his bones or is killed. Then his injury arises out of his employment. If he had not been driving his wagon and fallen to the street, he would not have been hurt. (Italics supplied.)

Awards in the following cases, where death resulted from unwitnessed falls, were unanimously affirmed by the Appellate Division in New York, without opinions.

A woman hurrying along a street on a rainy day heard a bang and a thud and looking around saw a watchman lying on a walk in front of his shanty with the back of his head upon an iron pipe. He died four days later without recovering consciousness. He was sixty years old. The Department found that he had slipped and fallen, striking his head and lacerating his brain. The carrier contended that he had a stroke of apoplexy: *Jennings v. Fillmore Building Corp.*, 216 App. Div. 775. (S. B. No. 149, N. Y. Dept. of Labor, p. 274.)

A checker for a steamship line was on an East River dock alongside a vessel whose unloading he had been attending to. The unloading had been completed at 5 p. m. His usual time for quitting was 5.30 p. m. Sometime between 5.30 and 6 p. m. he fell into the water. His dead body was recovered almost immediately. No one witnessed his fall. A man had heard a splash and seen him in the water. Upon appeal from an award to his widow and children, the carrier said that there was evidence that he was waiting for a friend and when last seen upon the wharf was sitting on the cap log. There was no evidence, it said, that he was working overtime because of special orders or circumstances. The Attorney

General said that he had to stand by until everything was cleared up, that steamship clerks work beyond regular hours when necessary, using their own judgment, and that the presumptions of section 21 of the Workmen's Compensation Law were not overcome. The courts affirmed the award, unanimously and without opinion: *Windrums v. Munson S. S. Lines*, 222 App. Div. 707; 248 N. Y. Rep. 544. (S. B. No. 156, N. Y. Dept. of Labor, p. 305-306.)

A milk wagon driver was found unconscious and remained so two days. Upon appeal from an award to him for disability, the carrier said the case had all the ear marks of an epileptic fit. The Attorney General said that women had heard him fall downstairs while he was delivering milk, that he himself was sure that he had so fallen, that he had a fractured skull and that hospital physicians took thirteen stitches across his mouth and eye: *Rockett v. Borden's Farm Products Co.*, 222 App. Div. 786. (S. B. No. 161, N. Y. Dept. of Labor, p. 235.)

The appellant throughout its brief suggests that the cause of Mr. Brosnan's fall was due to some internal disorder and inherent disease, although it is not supported by the record. Assuming for the purposes of this argument, but not in the least admitting, that Mr. Brosnan did have some internal disorder or idiopathic condition, if as a matter of fact he died as a *result of the fall itself*, the injury arose out of and in the course of the employment.

This position is amply supported by authorities both in England and the United States.

In England the case of *Wicks v. Dowell & Co.* (1905) 2 K. B. 225, is the leading case on this point and is followed in numerous American decisions. In that case a workman was employed in unloading coal from a ship and while so doing he was seized with an epileptic fit, to which he was subject, falling into the hold of the ship, sustaining injuries. In holding that the injury arose out of and in the course of the employment the rule was laid down that although the cause of the fall was a fit, the direct cause of the injuries *was the fall itself* and the consequences of the fall are compensable.

In the case of *Wright & Greig, Ltd. v. McKendry*, 56 S. L. R. 39, 11 B. W. C. C. 402, a Scottish case, the deceased was found in the store of his employer lying on the floor suffering from a fractured skull by reason of a fall. It further appeared that he was apparently suffering from a uraemic fit which caused the fall. However, the death was certified to be caused by a "fractured skull." In holding that death was due to an accident arising out of his employment, the court said:

He had a fit, but that in itself was not an accident, nor was it the proximate cause of McKendry's death, which was directly due to his head coming violently in contact with the concrete floor whereby his skull was fractured.

In the case of *Rockford Hotel Company v. Industrial Commission*, 300 Ill. 87, an employee because of an epileptic seizure fell into hot cinders which he was removing from a furnace and was burned to death. No one saw him fall but there was medical proof that in a previous year he had spasms resembling epileptic fits. In holding that the death arose out of and in the course of the employment the court states the law as follows:

The fact that we can not overlook or ignore is that Madison, by reason of his falling into the pit while engaged in performing the duties of his employment, was so severely injured that he died from the injuries. *He did not die from epilepsy or pre-existing disease, but from the burns he received from falling into the pit.* Some cases hold that, where an employee is seized with a fit and falls to his death, the employer is not liable, because the injury did not arise out of the employment; but a majority of the courts, American and English, hold that, *if the injury was due to the fall*, the employer is liable, even though the fall was caused by a pre-existing idiopathic condition. (Italics supplied.)

In the case of *Gonier v. Chase Co.*, 97 Conn. 46, citing the *Wicks* case, *supra*, a painter fell from a scaffold due to unconsciousness caused by indigestion to which he was subject. In holding that the injury arose out of the employment the court says:

We must hold that the proximate cause of the decedent's injury was his fall, and the proximate cause of his fall was his attack of indigestion. Whether his physical condition had been idiopathic, or due to his own fault, or to something that had occurred while he was outside the course of his employment, if, by reason of it, he fell and injured himself, the proximate cause of the injury in each case was the fall, and of the fall the physical condition.

In *Cusick's case*, 260 Mass. 421 (1927), an employee suffered an attack of epilepsy while going downstairs and as a result of the consequent fall he died from fracture of the skull. The court in holding that the injury arose out of and in the course of the employment says:

An employee can not recover under the statute unless the injury is received while he is engaged in the course of his employment and the injury arises out of or is caused by the employment. But if, while doing the work for which he is hired, he suffers an injury that may be attributed to his employment and not solely to some disease or physical weakness not caused by the employment, he may recover. It might well have been found that the employee's death resulted not from epilepsy but because of the fracture of his skull. The circumstances that the epilepsy contributed in part to the fall did not prevent a finding of a causal connection of the employment with the injury.

It will be seen from the authorities quoted that even assuming that the appellant is supported in his conjecture that the cause of Mr. Brosnan's fall was an inherent bodily condition, still, under the decisions in this country and elsewhere, the finding of the deputy commissioner that Brosnan's death arose out of and in the course of the employment is amply supported and should be sustained.

On page 9 of the appellant's brief is quoted the presumption in section 20 (a) of the Longshoremen's Act which provides that it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the Act. The Department of Labor, State of New York, makes the following observations based upon decided cases in that State upon section 21, of the New York Workmen's Compensation Law, which is the counter-part of section 20 of the Longshoremen's Act.

Section 21 sets up a presumption that a compensation claim comes within the Workmen's Compensation Law's provisions; that is, that the employee has met with injury in one of the occupations listed in the law's coverage section, Sec. 3, and that such injury has arisen out of and in the course of such occupation. The presumption comes into play in cases of unwitnessed death or cases of employees who lose their mental faculties and do not regain them. It is overcome by the presence of "substantial evidence to the

contrary.” Such evidence to the contrary may indicate that the death or loss of faculties has been due solely to disease, with no injury figuring at all, or has been due primarily to disease, with an injury as a sequence. Or such evidence may indicate that the employee was not engaged in his occupation at the time of his death or loss of faculties. (S. B. No. 161, N. Y. Dept. of Labor, p. 233.)

The cases cited by the appellant in its brief are not applicable to the situation presented in the case under consideration.

CONCLUSION

In conclusion, it is respectfully submitted that the evidence presented before the appellee, R. J. Hoage, deputy commissioner administering the compensation act in the District of Columbia, as reported in the transcript of record filed in this case, shows that Mr. John Brosnan, Jr., on November 25, 1930, was in the employ of the Washington Post Company as a solicitor and that while engaged in his master's business he sustained injuries by reason of a fall on the public highway arising out of and in the course of his employment.

The appellant's contention that this employee's death was due to some weakness inherent in his own person is entirely unsupported by the evidence. On the contrary, the falling position of the employee with his hands thrown above his head estab-

lishes a very strong presumption that he was conscious during the fall and was instinctively trying to regain his balance, as against the contention that he lost consciousness.

From the authorities above quoted there is ample precedent supporting the appellee's compensation order holding that Mr. Brosnan's death arose out of and in the course of his employment. The record does not disclose that the appellant offered any "substantial evidence to the contrary," required by section 20 of the Act, and a strong un rebutted prima facie case has been established by the evidence.

The appellee respectfully submits that the decree in the court below should be affirmed with costs.

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